

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Quin Te Marae Pouesi (Applicant)
AND The Youth Horizons Trust (Respondent)
REPRESENTATIVES Helen Thorpe, Advocate for Applicant
Chris Patterson, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 22 November 2005
DATE OF DETERMINATION 16 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant was employed by the respondent for one year from May 2004 to May 2005.

On 2 June 2005 the applicant filed a Statement of Problem in the Authority seeking to recover arrears of wages, holiday pay and commissions she alleges is owed to her. Mediation took place in respect of this application on 3 August 2005. That mediation was unsuccessful and on 11 August the applicant filed an Amended Statement of Problem with the Authority which reiterated her arrears claim and submitted a personal grievance claiming that she had been unjustifiably constructively dismissed from her employment with the respondent.

The applicant submits that her grievance (which the evidence shows was first advised to the respondent on 12 or 14 August) was raised within the 90 days allowed for raising a personal grievance with an employer (s.114 (1)). The employer disputes this and says the grievance was raised 94 days after the employment ended. The respondent does not consent to the submission of the grievance after the expiration of 90 days.

In the event that I find the grievance was not submitted within 90 days, the applicant seeks leave to raise the grievance out of time pursuant to the provisions of s.114 (3) &(4) of the Act.

Background

The parties entered into an employment relationship on 7 May 2004. The employment agreement between the parties describes the relationship as being casual. Ms Pouesi was primarily engaged to

undertake tasks associated with the relocation of the respondent's offices. The employment agreement described every engagement of the applicant as a separate engagement. The applicant was paid an hourly rate and invoiced the respondent for hours she worked. She was to be paid 6% holiday pay with payment on each invoice submitted by her. The employment agreement provides that the applicant would be provided with one hour's notice of termination.

There were some variations to the arrangements between the parties when the applicant took on recruiting caregivers for the respondent in addition to the contracted arrangements between the parties whereby the applicant was assisting with the relocation project. There are significant differences between the parties as to whether the relationship was ever "casual" or whether in fact it evolved into a fixed term employment or even permanent employment¹

On May 5 2005 Ms Pouesi had a telephone conversation with Mr Bishop, Community Services Manager. It was agreed that the Ms Pouesi would cease to undertake further contracted hours for YHT apart from handover work associated with the recruitment of caregivers. That handover work was expected to be completed within 7 days.

Position of the Applicant

The applicant accepts that she had a discussion with Mr Bishop on the morning of 5 May and that it was agreed that she would undertake no further work for the Trust with the exception of the handover work that was required. She said she told Mr Bishop this would take her seven days. She submits she was referring to seven working days. She submits she did that work and submitted an invoice as usual. She calculated her working hours, on handover related tasks, as commencing on 6 May and ending on 16 May. With her employment ending on 16 May it is the applicant's submission that, given that fact the grievance was filed with the Authority on 11 August 2005, she had advised her personal grievance within the time prescribed by s.114(1) of the Act.

If the Authority finds that she did not submit her grievance within the allowable time frame the applicant asks that the Authority give her leave to raise the grievance out of time.

By way of an explanation as to the exceptional circumstances which occasioned the delay in raising the grievance, the applicant submits that she wanted to raise her grievance immediately following the termination of her employment. However, she was primarily interested in recovering the wages, holiday pay and commission she alleges is owed to her and she decided it would "not be nice" to pursue her grievance against the respondent because it is a not for profit organisation. Ms Pouesi submitted that she took steps to have an early date for mediation but that did not occur until 3 August. The dispute between the parties was not resolved in mediation so Ms Pouesi decided to pursue her personal grievance.

At the investigation meeting Ms Pouesi also submitted another take on the cause of her grievance. She submitted that the grievance she has suffered came about as a result of the delay in achieving a resolution of her arrears claim.

Position of the Respondent

It is the position of the respondent that the applicant was employed from 7 May 2004 as a casual worker to undertake work associated with the respondent's relocation to new offices. It is also

¹ The parties have filed papers asserting their positions on the real nature of the relationship. It is evident on the papers that there is dispute on this point such that another investigation would need to be conducted to resolve the matter.

submitted that the parties later agreed (verbally) that Ms Pouesi would undertake the recruitment of caregivers within the framework of the casual employment agreement that governed the relationship between the parties.

It is submitted that on 5 May the applicant was given 7 days notice of the termination of her employment with the respondent. She was only entitled to one hour's notice under the employment agreement but the respondent gave 7 days notice and the applicant was directed to undertake handover duties only. It is the respondent's position that the applicant's employment finished on 12 May and it was surprised to receive an invoice from the applicant for hours which included claims for hours worked up to 16 May. This invoice has not been paid. It was the oral evidence of witnesses for the respondent that the grievance was not raised with the respondent until 14 August 2005² (which is 94 days after the termination of the employment).

It was also submitted for the respondent that the reason given by the respondent's representative for filing the personal grievance was that the applicant had hoped the respondent would meet her arrears claim. This does not amount to an exceptional circumstance. Further, none of the exceptional circumstances in s.115 of the Act apply to the present situation and neither would it be just or equitable for the Authority to grant the applicant's application out of time.

Issues to be Decided

The following issues must be decided by me.

- Did Ms Pouesi raise her grievance with her employer within 90 days of the grievance occurring.

If the answer to that question is "No" then

- Do exceptional circumstances exist; and
- Did those exceptional circumstances occasion the delay in raising the grievance; and
- As the Authority Member determining the matter do I consider it just to grant leave to raise the grievance out of time.

Discussion and Findings

Was the grievance submitted within 90 days?

On 5 May 2005 following the discussion between Mr Bishop and Ms Pouesi, Mr Bishop followed up the call with an email to Ms Pouesi. This email recorded the agreement reached in the telephone conversation. As a contemporaneous record of the discussions and agreement between Mr Bishop and Ms Pouesi relevant portions of that email are of assistance in determining this matter.

² In closing submissions it is stated that the respondent was advised of the alleged grievance for the first time on 12 August 2005 (i.e. 92 days after the employment terminated on 12 May 2005).

Mr Bishop records at Pt 2:

*You agreed to meet with Robin Sila **over the next seven days** to hand over all resources that you have developed for the recruitment of caregivers.....*

At Pt 4 he records:

*We agreed that apart from this hand over work with Robin, you would undertake no other contracted hours for Youth Horizons and that you would submit the hours worked handing over resources to Robin on timesheet **next** week.*

And at Pt 5:

*We both agreed the time scale for this handover should be **within** seven days so that a national recruiter could pick up the work when appointed.*

Ms Pouesi does not dispute the contents of the email to her but rather submits she believed the seven days discussed meant seven working days and that went from 6 May to 16 May inclusive.

I find that does not reflect the agreement between the parties. Ms Pouesi was given seven days notice. The employer submits that was seven calendar days notice. The agreement between the parties reflects this as it is clear that the handover was to be completed **within seven days**. If it were agreed the seven days meant seven working days that is what I would have expected to have been recorded. The expression "seven days" in this context would normally be interpreted to mean seven calendar days unless otherwise stated. Point 4 of the email supports my finding on this. It states that it has been agreed that Ms Pouesi would submit the hours worked on the hand over on a time sheet next week. Writing on 5 May *next week* necessarily refers to the week beginning Sunday 8 May and finishing Saturday 14 May or (if one were not so literal) the working week ending 13 May.

Given that everything about this contemporaneous record of the discussion between the parties points to the employment ending on 12 May or at the very latest by the end of the week (13 May) I find that Ms Pouesi's employment ended on 12 May 2005 in accordance with the notice given to her on the 5th. If I am wrong on this, the employment certainly ended on 13 May.

The submission of grievance was filed with the Authority on 11 August 2005. That however does not raise the grievance with the employer and the earliest date that I can find the grievance was raised with the employer was 12 August 2005.

Taking 12 May as the date of termination of the employment (and it is the termination of the employment that Ms Pouesi submits founds her claim of unjustified constructive dismissal) and the submission of the grievance on 12 August I find the grievance was raised with the employer 92 days after the action which gave rise to the grievance arose. Even if I were to take 13 May as the last day of employment the grievance was not raised with the employer for a period of 91 days which is outside the time allowed under s.114(1) for raising a grievance.

Are there exceptional circumstances which occasioned the delay in raising the alleged grievance?

The applicant is saying that the fact her arrears claim was not resolved in mediation constitutes an exceptional circumstance which warrants the granting of leave to raise the grievance out of time.

I cannot accept this reason amounts to an exceptional circumstance that justifies the granting of the leave sought. The applicant has been represented by an experienced advocate from 29 June 2005. If

the applicant had a genuine grievance I am sure it would have been advised and filed promptly after the grievance arose. It is most unfortunate the applicant chose only to pursue her alleged grievance after the mediation on the arrears claim (which is strongly resisted by the respondent) failed to resolve the matter. Sadly it invites a question as to the applicant's motives in bringing the grievance claim.

Determination

The applicant did not advise the employer of her alleged grievance within 90 days following the date of the termination of her employment.

There are no exceptional circumstances which occasioned a delay in raising the grievance and it would not be just to do so.

Costs

Costs are reserved and will be dealt with following determination of the applicant arrears claim which should now be scheduled for hearing.

Janet Scott
Member of Employment Relations Authority